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NOT FOR PUBLICATION

MAR 09 2005

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TOMMY CELAYA, JR.,

Defendant - Appellant.

No. 04-10094

D.C. No. CR-03-00872-EHC

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Submitted February 11, 2005**
San Francisco, California

Before: WALLACE, RAWLINSON, and BYBEE, Circuit Judges.

Tommy Celaya, Jr. appeals a judgment of the district court convicting him of assault resulting in serious bodily injury within the Apache Indian Reservation, a violation of 18 U.S.C. §§ 113(a)(6) and 1153, and sentencing him to 117 months in prison.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Celaya's motion to file a supplemental brief is denied.

Celaya contends that the district court committed plain error by failing to *sua sponte* instruct the jury as to the definition of assault, by failing to instruct the jury that an assault must be committed intentionally, and by including a definition of “knowingly.” We disagree. Ample evidence was adduced at trial that Celaya viciously assaulted the victim and did so intentionally. *See United States v. Belgard*, 894 F.2d 1092, 1094-95 (9th Cir. 1990); *see also United States v. Wagner*, 834 F.2d 1474, 1485 (9th Cir. 1987). In addition, the jury’s question did not reflect confusion about a central issue in the case. *Cf. Powell v. United States*, 347 F.2d 156, 157 (9th Cir. 1965). Under these circumstances, we cannot conclude that plain error occurred, even if the instructions were less than ideal. *See Belgard*, 894 F.2d at 1095.

Celaya also contends that the district court abused its discretion by refusing Celaya’s requested jury instruction on self-defense. A defendant is entitled to a jury instruction regarding his theory of defense if it is legally sound and founded in the evidence. *See Beardslee v. Woodford*, 358 F.3d 560, 577 (9th Cir. 2004). Celaya offered no evidence that the force he used to assault the victim was reasonably necessary under the circumstances, an element of self-defense. *See United States v. Keiser*, 57 F.3d 847, 851 (9th Cir. 1995). Therefore, Celaya did not present sufficient evidence to warrant a self-defense instruction. *Cf. United States v. Morton*, 999 F.2d 435, 437-39 (9th Cir. 1993).

AFFIRMED.